83-6454

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. _____

ORIGINAL

ALLEN SANSON, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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March 19, 1984

QUESTIONS FOR REVIEW

1. Has the Seventh Circuit misinterpreted this Court's opinion in Ohio v. Roberts by failing to follow six other Courts of Appeals in finding that Roberts and the Confrontation Clause require a case-by-case constitutional analysis separate from that of Rule 801(d)(2)(E), Fed.R.Evid?

2. Is a prosecutor's second-hand belief that a hearsay declarants' attorney would have advised the declarant to assert the privilege against self-incrimination insufficient to establish the declarants' constitutional unavailability under the Confrontation Clause?

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TABLE OF CASES AND OTHER AUTHORITIES

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OPINIONS BELOW

The trial court issued no opinion. The minute order adjudging Petitioner guilty appears in the Appendix. The opinion of the Court of Appeals is unreported, pursuant to local Circuit Rule 35(c), but appears in the Appendix. United States of America v. Allen Sanson, No. 83-1324 (7th Cir. Jan 18, 1984). Circuit Rule 35(c)(2) states that the "statement of facts [in] the order ... may not be complete or detailed."[1]

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on January 18, 1984, affirming petitioner's conviction entered January 6, 1983. This petition was filed within 60 days of January 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and this Court's Rule 20.1.

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[1] The caption of the case in this Court contains the names of all parties.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sixth Amendment of the United States Constitution, U.S. Const. Amend. VI:

> "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...."

21 U.S.C. § 846 (1976):

> "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

21 U.S.C. § 841(a)(1976):

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

STATEMENT OF THE CASE

A. JULIO MUNIZ

On the morning of August 18, 1982, Julio Muniz ran a small grocery store in Chicago, Tr. 62, and was already a one-time loser. He had been indicted four months earlier for possession and distribution of heroin.[2] His case was still pending. Trial was approaching. Although he had at first been provided with court-appointed counsel in that case, he had just retained a paid attorney. His wife had retained a second paid attorney. Muniz's house was for sale. Tr. 117-118.

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[2] Muniz and his wife, Martinez, had both been implicated in the events leading up to a May 6, 1982 indictment. See docket of United States v. Rosado, No. 82-CR-313, opened April 29, 1982.

B. MUNIZ'S LAST CHANCE

Muniz had been contacted the day before by two heroin sellers who offered to sell Muniz four kilos for $100,000. Tr. 28-30. However, the sellers told Muniz he could not have delivery until he proved that he could pay. They demanded $30,000 as a down payment. Tr. 61, 61b, 69, 78. Muniz desperately needed a new source of supply who did not know about his indictment, who would not fear that he had become an informer. Tr. 120.

C. THE "REVERSE STING"

Unknown to Muniz, his luck had entirely run out. The sellers were in fact undercover D.E.A. Agent Arreguin and a Government informant, Pena, a migrant worker. Tr. 146-147. Arreguin was to arrest Muniz and his wife, Martinez, that afternoon, August 18. Tr. 92. Muniz was to discover Arreguin's identity only moments before his arrest. Tr. 90-91. Meanwhile, Muniz urgently sought to reassure his new supplier and close the deal.

D. THE REASSURANCE

Muniz had had trouble raising the down payment. He had made the sellers wait one day, then two, as he tried to gather cash together. Tr. 61, 65, 66-67. The seller, Arreguin, pressed for the down payment. Muniz assured him that a white man, his courier, would soon deliver the money. Tr. 65. To further placate Arreguin, Muniz told stories of past narcotics deals. Tr. 61b, 62, 64. He displayed jewelry and gold. Tr. 72-73. He described real estate, cars, clothes--all bought, he said, with narcotics profits. Tr. 61b, 62, 64, 72-74, 141, 142. He offered the sellers dinner, a place to stay. Tr. 61a, 72. He urged them

to remain calm, to believe that he was good for the money. Arreguin later testified, "He was trying to impress me, I think." Tr. 72. "He was bragging a lot." Id.

E. THE STALL

On the 18th, as Muniz, Arreguin, and Pena were waiting at Muniz's house, Muniz tried, over the telephone, to hurriedly sell the heroin he was about to buy. Tr. 77-78. He was having "cash flow" problems. Tr. 78. He told Arreguin that $15,000, half of the down payment, was on the dining room table, and that another $5,000 to $10,000 would be delivered soon. Tr. 67-69, 170, 175, 175. In fact, Arreguin later counted only $6,570 on the table. It was arranged with large bills on top, and rubber-banded. Tr. 68 (GX 4).[3] Muniz was going to be far short of the amount he needed to close the deal.

F. THE COURIER'S RACE

Although Muniz first described his courier as white, tr. 65, he later told the sellers that the courier was a "colored man" in his "organization." Tr. 67. Muniz painted a picture of a large marketing organization, staffed by lieutenants wealthy in their own right. The courier, Muniz said, "always drives a blue Cadillac." Tr. 81-82. No evidence of any courier exists besides that attempting to portrary Sanson as the courier. Nor does any first hand evidence describing Muniz's "organization" exist. Petitioner Sanson, a black man, drives a 1973 Dodge. Tr. 245.

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[3] GX = Government Exhibit.

G. THE REPEATED "PHONE CALLS"

In the seller's presence, Muniz made and received several telephone calls concerning the grocery store he ran. Tr. 124. It was not his habit during these calls to repeat the words spoken by the other party. Tr. 124-125. Arreguin the seller was impatient. He asked what was taking the courier so long. Tr. 69. He told Muniz that if he did not see the rest of the $30,000, he would not deliver the heroin. Tr. 69-70. Muniz went to the telephone, consulted a name and address book, and dialed an unobserved number. Tr. 70. Arreguin increased the pressure. He said, "Look, I think you're having a little problem coming up with this kind of money. I don't think you can come up with a hundred thousand. I think you're having a hard time coming up with 30 thousand." Tr. 78. The seller's urgent query and Muniz's calls were twice repeated that afternoon. Tr. 74-75, 78, 80-81. During these calls, unlike the grocery store calls, Muniz would repeat what Arreguin thought was being said on the other end. Tr. 71. During the first call, he convinced the agent/seller that the "organization man" was on the way. Tr. 71-72. During the second call, the "courier" had developed a flat tire, but was in the neighborhood. Tr. 74-75. During the third call, he was on the corner nearby. Tr. 80-81. Arreguin never saw the number dialed; never heard a voice on the other end of the line. Tr. 81. Only once did a drug-related call come in to Muniz. Muniz told the caller to meet his wife "on the corner". Tr. 86.

H. THE TARGET'S ARREST

Muniz then sent Martinez to get him some food from a nearby convenience store, a White Hen Pantry. Tr. 83. He also

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[4] Even with the $10,000, and even if the cash on the table were $15,000 instead of $6,570, Muniz would still be $5,000 short of the $30,000 down payment needed, and would have to bargain further to close the deal.

told her to look for the "courier" and to get $10,000 from him.[4] Arreguin could not tell if Martinez left the house with any large amount of money concealed. Tr. 84-85. There were twelve surveillance agents outside Muniz's house, "almost circling the whole house." Tr. 82, 127. One of them, Agent Tucci, tailed Martinez. Tr. 207-209, 211, 212. Martinez returned with food, and produced what was supposed to be close to $10,000. Tr. 88-90. The money was rubber-banded, like the money already on the dining room table. Id. The bundle was, in fact, only $2,800. Id. (GX 5.) The informant left the house to tell the surveillance agents to "hit the house," and Muniz and Martinez were arrested. Tr. 89-92, 178.

I. MUNIZ' SENTENCE

Muniz plea bargained with the prosecutor and received dismissal of all three counts in this case, in exchange for a sentence of 12 years imprisonment and a special probation term on other outstanding charges. The Government moved to dismiss all charges against Muniz in this case as early as October 1, 1982, three months before petitioner Sanson's trial. Muniz was sentenced on October 22, 1982, over two months before Sanson's trial. Martinez, Muniz's wife, pleaded guilty a month before trial and received five years' probation as punishment.

J. PETITIONER SANSON'S ADDICTION AND CONVICTION

On the morning of August 18, 1982, petitioner Allen Sanson was still a heroin addict. Tr. 237. Although he had a job doing body work in an automobile garage on the South Side of Chicago, he sniffed heroin. Tr. 236-238. His fiance had seen him sick. Tr. 237. He had scars on his arms. Tr. 238. That

afternoon, he had at least $1,600 in his pocket, and wanted heroin. Tr. 99. He went for a ride up to Muniz' neighborhood with his cousin, Charmaine Walls, an employee with the Federal Reserve. Tr. 243, 245.[5] Sanson's car was a 1973 Dodge. Tr. 245.

H. THE BUY BEGINS

They drove to a parking lot, in front of a White Hen Pantry and a McDonald's. Tr. 246. In the White Hen Pantry, Sanson met Martinez. Id. Sanson and his cousin then went into the McDonald's for a bite. Id. Sanson went to the bathroom. Tr. 247.

I. THE INFORMER'S "LUCK"

After telling the surveillance agents surrounding the house to "hit it," Pena testified that he drove to the White Hen Pantry to make an urgent phone call. Pena claimed that, while waiting to make the call, he happened to stand behind Sanson. Pena said he saw Sanson dial Muniz's number, and heard him ask for Muniz. Tr. 179-180. However, when Pena was asked what urgent call he was in line to make, he said he stopped to call the D.E.A. because he heard Sanson dial and ask for Muniz. Tr. 180. Pena did not explain this circular logic at trial. Pena said that he got no answer at the D.E.A. and no answer at Muniz's house. Tr. 194-195.

The agent/seller Arreguin testified that he received a call at Muniz' home immediately after Muniz's and Martinez's arrest. Tr. 92-93. Arreguin's caller allegedly said that he had sent the money and would wait on the corner. Tr. 93. The agent

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[5] Ms. Walls was not suspected of any illegality and was not arrested or charged.

said that he would be right there. Id. The only evidence of the earlier calls was the agent's impression of Muniz's side of the conversations.

J. SANSON'S BUY ABORTED BY ARREST

Flush from the arrest of Muniz and Martinez, Arreguin and Pena arrived at the McDonald's. Tr. 93-95. They went into the bathroom after Sanson, leaving half a dozen other agents inside and outside the restaurant. Tr. 95-97, 134. Arreguin asked if Sanson was the one who sent the money. Tr. 96. He later testified that Sanson replied affirmatively and said, "Did you bring the sample of heroin, you know, so I can test it?" Id. Arreguin said he had it in his pocket, but in fact, since it was a reverse sting, no heroin existed at all. Id. Sanson suggested that they exchange the drug down the street. Tr. 97.

Leaving the restroom, Sanson allegedly recognized Peasant, one of the other agents. He said, "Oh, I knew this was going to happen." Tr. 98. He was placed under arrest and taken outside. Arreguin and the informer testified that after being read his rights, Sanson continued to chat. He was said to have asked Peasant, "Don't you remember you arrested me in Hammond, Indiana a couple of years ago?" Tr. 100. There was no evidence of an earlier arrest in Hammond. Sanson was in prison from 1974 until 14 months before this arrest.

K. THE DEFENSE THEORY

At trial, petitioner Sanson did not dispute that a conspiracy to distribute heroin and cocaine existed between Muniz, his wife Martinez, Pena, and Arreguin. Sanson also did not dispute that he was attempting to commit an illegal act -- to pur-

chase heroin. But Sanson was neither charged nor convicted of attempted purchase. He stands convicted of conspiracy to distribute under 21 U.S.C. § 846 (1976). At trial, the defense showed that Sanson was a heroin addict, that he knew Muniz and Martinez, that he drove to Muniz's neighborhood, that he met Martinez on the day of his arrest, and that he was arrested with $1,600 in his pocket. Sanson's entire defense was that he was not a knowing participant in the conspiracy and that Muniz was a dealer trying to close one last deal before going to jail.[6]

L. THE GOVERNMENT'S CASE

The government did not attempt to prove Sanson's participation in the cocaine conspiracy although it introduced much evidence of the cocaine conspiracy. See GX 1, GX 4, Tr. 44, 54-56, 78-80, 83, 91-92, 152-55, 162-64, 177, 173-74, 209, 213-14. The cocaine charges remained in the indictment. Tr. 284-85. The government proved, in the words of the trial judge at sidebar, "a wonderful case against Muniz." Tr. 203. Muniz was never called by the Government as a witness. Neither was Martinez. No heroin was ever introduced because no heroin ever existed.

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6 Sanson's defense was far less than vigorous. The defendant's case in chief consumed a slight eleven and one-half pages of the 300-page transcript. No objection was made to references to defendant's former arrests. When the informant was caught in a wildly improbable statement--that he was able to see Sanson dial Muniz' number because nothing protected the phones from weather on the outside wall of the White Hen Pantry--no photograph of the telephones was introduced to confirm the lie. No objection was made to the focus given to cocaine by the jury instructions. Tr. 340. No objection was made to the indictment references to a cocaine conspiracy which the jury took with them into the jury room. No objection was made when the trial court violated the provisions of the Speedy Trial Act by excluding all the time between the day of arrest and the end of the year. Judge Leighton ordered on December 7, 1982 that future time be excluded and failed to state in writing his grounds for doing so. No objection was made.

The most damaging evidence introduced against Sanson was from Muniz. Although Muniz was never present at trial, his hearsay statements were repeated to the jury by agent Arreguin and the informant, Pena. These hearsay declarations by Muniz to the sellers Arreguin and Pena asserted that Sanson had a role in Muniz's "organization," that he had worked for Muniz for a long time selling drugs, tr. 67, 172, 190, 191, 198, and that he was dependable. Tr. 67.

M. THE DECLARANT'S AVAILABILITY

Muniz was in the custody of the government prior to trial. Pretrial tr. 21. He had already plead guilty. Id. He had already been sentenced. No appeal was pending. Id. The time for appeal had expired over 30 days earlier. The government made no attempt at all to produce Muniz. The only evidence of Muniz's unavailability is a second-hand representation by the prosecutor. The prosecutor told the trial court that defense counsel had said that Muniz' lawyer had said he would advise Muniz to "exercise his rights" if called by the defense. Pretrial Tr. 21. There is no evidence of any inquiry by the Government.[7] There is no evidence that any inquiry at all, by the prosecution or by the defense, took place after Muniz pleaded guilty, received a sentence and waived appeal.

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[7] To the best of appellate counsel's knowledge, Muniz was and is incarcerated in federal prison in Oxford, Wisconsin, less than 200 miles from Chicago. The Government brought to Chicago its informant, Pena, who lives in Westlaco, Texas. Westlaco is over 1400 miles from Chicago, in the southernmost tip of Texas. Martinez was also available to the Government. She pleaded guilty prior to Sanson's trial.

M. THE VERDICT

Defense counsel argued at trial that insufficient evidence existed to tie Sanson to the conspiracy, independent of co-conspirator Muniz's hearsay declarations. The trial court incorrectly analyzed the independent evidence "in the light most favorable to the jury, as I must," and declared it a jury question. Tr. 220, 223-224.[8] The jury was not instructed to ignore the hearsay itself when deciding.

After deliberating, recessing for the evening, and deliberating the next day, the jury returned a verdict of guilty on January 6, 1983. A judgment of conviction was entered on the same day. On February 11, 1983, petitioner's motion for a new trial was denied and petitioner was sentenced to ten years imprisonment. Simultaneously, petitioner's request to file notice of appeal and to proceed in forma pauperis were granted. Notice of appeal was filed on February 17th, 1983.

N. THE APPEAL

On appeal with different counsel, Sanson argued that the Government's complete failure to even attempt to call Muniz violated Sanson's Right of Confrontation. Three other issues were argued, unrelated to this petition. The Court of Appeals decided on January 18, 1984 that the co-conspirator hearsay exclusion, Rule 801(d)(2)(E), Fed. R. Evid., satisfied the Confrontation Clause, and that Muniz was adequately shown to be unavailable. This petition followed.

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8 The Government admitted on appeal that the judge applied the wrong legal standard. The Court of Appeals, relying on the "slight evidence" rule, found it harmless error. See United States v. West, 670 F.2d 675 (7th Cir.), cert. denied, 457 U.S. 1124 (1982).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISIONS OF SIX OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF THIS COURT'S OPINION IN OHIO V. ROBERTS.

The Confrontation Clause requires that the accused be given the opportunity to expose falsity in statements used against him. This Court has found that when the accusing testimony is otherwise admissible hearsay, the Clause requires a two-pronged showing: (a) the accuser's statements must be reliable, and (b) the accuser must not be available to the Government. Ohio v. Roberts, 448 U.S. 56 (1980); Barber v. Page, 390 U.S. 719 (1968).

The Court of Appeals below found that the evidentiary standard of Rule 801(d)(2)(E), dealing with co-conspirator hearsay, satisfies both constitutional requirements simultaneously. (See p. A-11 of the Appendix hereto.) The Court of Appeals explicitly embraces this per se rule -- that Rule 801(d)(2)(E) universally satisfies the Confrontation Clause -- and proscribes a separate case-by-case constitutional analysis.

The opinion below raises important doctrinal questions of interpretation. The opinion below rests on United States v. Papia, a Seventh Circuit case decided before this Court issued Ohio v. Roberts. The Seventh Circuit has by its silence found that Roberts did not overrule Papia's per se finding. Yet Courts of Appeals abandoning the per se rule have done so on the strength of Roberts. Compare United States v. Ammar, 714 F.2d 238, 254-57 (3rd Cir. 1983)(case-by-case analysis) and United States v. Peacock, 654 F.2d 339 (5th Cir. 1981)(case-by-case analysis) with United States v. Kenney, 462 F.2d 1205, 1218 (3rd Cir. 1972) (presuming no Sixth Amendment violation where evi-

dentiary standards satisfied) and United States v. Goodman, 605 F.2d 870, 877-78 (5th Cir. 1979)(same). This doctrinal dichotomy, directly interpreting an opinion of this Court, demands further interpretation by this Court.

The Seventh Circuit has conceded that its interpretation of the Confrontation Clause directly conflicts with that adopted by the Eight and Ninth Circuits. See United States v. Papia, 560 F.2d 827, 836 n.3 (7th Cir. 1977), citing United States v. Kelley, 526 F.2d 615, 620-21 (8th Cir. 1975), cert. denied, 424 U.S. 971 (1976); United States v. Snow, 521 F.2d 730, 734-36 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976). The Eighth and Ninth Circuits prohibit a per se rule. Since the Seventh Circuit first acknowledged the conflict, the Second, Third, Fifth and Tenth Circuits have followed the lead of the Eighth and Ninth Circuits, contradicting the opinion below and widening the rift. See United States v. Ammar, 714 F.2d 238, 254-57 (3rd Cir. 1983)(applying case-by-case analysis); United States v. Peacock, 654 F.2d 339, 349 (5th Cir. 1981)(separate analysis on strength of Roberts);[9] United States v. Wright, 588 F.2d 31 (2nd Cir. 1978) (recognizing split in Circuits); United States v. Davis, 578 F.2d 277 (10th Cir. 1978).

Only the First Circuit has agreed with the Seventh Circuit in adopting a per se rule. See Ottomano v. United States, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973). See also United States v. Lurz, 666 F.2d 69 (4th Cir. 1981) (failing to analyze the constitutional issue separately). The Ninth Circuit recently emphasized its disapproval of the

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9 Peacock is binding precedent on the Eleventh Circuit also. See Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981) (adopting Fifth Circuit precedent through September 30, 1981).

First Circuit approach. See United States v. Perez, 658 F.2d 654, 660 n.5 (9th Cir. 1980). The Third Circuit, avoiding a per se rule, recognizes the First Circuit case as contradicting the majority view and contrasts the First, Fourth and Seventh Circuits with the Second, Fifth and Ninth Circuits. See United States v. Ammar, 714 F.2d 238, 254-256 (3rd Cir. 1983). Thus, courts on both sides of the issue have recognized the conflict as deep and direct.

The contradiction cannot be more sharp. This constitutional conflict between most of the Courts of Appeals justifies the grant of certiorari to review the judgment below.

II. THE OPINION BELOW EMASCULATES THIS COURT'S OPINION IN OHIO V. ROBERTS.

A. THE OPINION BELOW ABANDONS THE TWO-PRONGED TEST REQUIRED BY ROBERTS.

While reaffirming the per se rule that the evidentiary standard universally satisfies the Confrontation Clause, the Court of Appeals below committed further error. The Court found that, on the facts of this case, the requisite constitutional unavailability was shown. See p. A-11 of the Appendix hereto. In so finding, the opinion below directly contradicts this Court's opinion in Ohio v. Roberts, 448 U.S. 56 (1980).

This Court has found that the Confrontation Clause analysis must be two-pronged. The accusing hearsay must be shown to be both (1) reliable and (2) necessary. See Ohio v. Roberts, 448 U.S. 56, 65-66 (1980). The second prong, necessity, may be shown by the declarant's unavailability. 448 U.S. at 65. Unavailability, the Government's burden, can be shown by good faith effort.

> The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness. As with other evidentiary

> proponents, the prosecution bears the burden of establishing this predicate.

448 U.S. at 74-75 (emphasis added).

The opinion below does not require a good faith effort on the part of the prosecution. It requires no effort. The Government here made no effort. The prosecutor merely repeated to the trial court what defense counsel had heard from declarant's attorney about the advice that declarant's attorney might give the declarant. By endorsing the blanket principle that Rule 801(d)(2)(E), Fed. R. Evid., automatically satisfies the Confrontation Clause, the opinion below rejects the necessity requirement. Therefore it abandons the two-pronged constitutional analysis of Roberts and thus runs afoul of this Court.

B. THE OPINION BELOW VIOLATES ROBERTS BY COLLAPSING THE CONSTITUTIONAL ANALYSIS INTO THE EVIDENTIARY ANALYSIS.

This Court has insisted that some otherwise admissible hearsay evidence will be objectionable on Confrontation Clause grounds. Thus this Court has required the two-pronged constitutional analysis to be separate from the evidentiary analysis. See Ohio v. Roberts, 448 U.S. 56, 63-64 (1980). The opinion below conveniently uses the evidentiary test to satisfy the constitutional requirement, thus collapsing the inquiry into only one evidentiary test. This contradiction between the Supreme Court and a Court of Appeals deserves review and reversal.

The Court of Appeals below has created a fundamental doctrinal conflict. Even if the opinion below had adopted a case-by-case analysis, analyzing the constitutional question separately and prong by prong, there would still be a split among the Circuit Court of Appeals. The Seventh Circuit rests its finding of reliability on Roberts. See p. A-11 of Appendix here-

to. Thus, although this Court refers in Roberts only to two "firmly rooted" hearsay expectations -- dying declarations and cross-examined prior trial testimony -- 448 U.S. at 66 n.8, the Seventh Circuit finds the co-conspirator hearsay provision also "firmly rooted." See United States v. Kendall, 665 F.2d 126, 133 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982) (relying summarily on Papia). The Ninth Circuit finds just the opposite: co-conspirator declarations are inherently suspect. See United States v. Fielding, 630 F.2d 1357, 1367 n.11 (9th Cir. 1980) (co-conspirator statements "not tested by traditional crucibles of reliability"). In Fielding, the declarants were attempting to strike a narcotics bargain with an undercover agent and an informer. The Ninth Circuit found that the declarations were

> almost entirely recitations of past events -- narratives of past importation schemes and business relationships, and were in part motivated by a desire to "impress" the informer who was posting as a big dealer looking for a deal. Thus (the declarant) had every reason to exaggerate his ability and experience (with the defendant).

630 F.2d at 1369. Fielding reversed the conviction, citing the violation of the Confrontation Clause as "clear constitutional error." This Court's opinion in Roberts is the fundamental authority relied upon in Fielding. This conflict between a Court of Appeals on the one hand and six other Courts of Appeals and this Court on the other hand justifies the grant of review.

III. THE OPINION BELOW RAISES IMPORTANT POLICY CONSIDERATIONS ARISING OUT OF A CONSTITUTIONAL ISSUE.

By its decision below, the Seventh Circuit crystellizes several policy questions unanswered by this Court. Among the questions are these:

(1) How should the constitutional requirement of showing a good faith effort be reconciled with the costs to the Gov-

ernment of making witnesses available? In Ohio v. Roberts, supra, the Government had attempted to serve the declarant with five subpoenas and interviewed her mother to determine her whereabouts. This Court found that effort to satisfy the good faith standard. In this case, no effort was found sufficient. To what extent should the cost of transporting witnesses in custody prevent the satisfaction of a constitutional right? Should the Government's good faith burden increase as the hearsay becomes more conclusively damning or as reliability appears weaker? See United States v. Fielding, 630 F.2d 1357, 1367 n.11 (9th Cir. 1980) ("it appears to this panel that the necessity requirement is more compelling where co-conspirator declarations are involved").

(2) Can the reliability prong of the Roberts analysis be constitutionally satisfied solely by a presumption of reliability drawn from alleged participation in a conspiracy where the finding of participation is in turn based on the "slight evidence" rule? Should the showing of reliability be stronger when the evidence of participation is slighter? Here, petitioner did not contest the existence of the conspiracy. The sole issue at trial was his participation in that conspiracy. The Seventh Circuit presumed petitioner's knowing participation. It presumed reliability for Confrontation Clause purposes when participation was shown. Finally, it presumed unavailability where a declarant was easily brought forward but hinted at the privilege against self-incrimination.[10]

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[10] Indeed, if Muniz had appeared, would he have been entitled to assert the privilege at all, or was he protected by the Double Jeopardy Clause? See Pillsbury Co. v. Conboy, 103 S. Ct. 608, 619 n. 1 (1983) (Marshall, J., concurring).

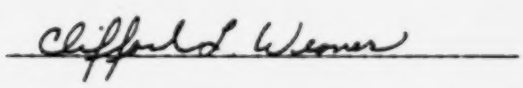
(3) Although this Court had hoped to avoid articulating a strict rule for each of the hearsay exceptions, see Ohio v. Roberts, 448 U.S. at 66 n. 9, does the wide division between the Circuits' interpretation of Roberts require this Court to further define "the basic interests to be accommodated" when dealing with co-conspirator hearsay? These policy questions urgently need the attention of this Court.

Moreover, the correctness of the decision below is open to serious question. Here, the declarant had every motive to exaggerate the size and nature of his drug business, and to describe a mere drug customer as a "courier." Declarant Muniz was trying to close one last deal as his trial approached. The customer, petitioner Sanson, was never present to contradict Muniz when the statements were made. Moreover, no direct evidence of Muniz's actual drug business was introduced. Cross-examination of the declarant here would have exposed Muniz' business for what it was and made the crucial difference in the jury's view of petitioner's relationship with Muniz. Indeed, the Ninth Circuit has found that where the declarant was in part motivated to impress an informer and had reason to exaggerate, that his hearsay declarations cannot meet the reliability test of the Confrontation Clause. See United States v. Fielding, 630 F.2d 1357, 1369 (9th Cir. 1980) (reversing narcotics conviction). Blanket reliance on the presumption of a "community of interests" among co-conspirators under the Confrontation Clause cannot be justified where knowing participation in a conspiracy can be shown by "slight evidence", and where the sole issue at trial is not the existence of the conspiracy but petitioner's knowing participation.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,



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APPENDIX

FILED

'82 SEP 17 P3:25

CLERK
U.S. DISTRICT COURT

No. _____

UNITED STATES DISTRICT COURT

NORTHERN District of ILLINOIS

EASTERN Division

THE UNITED STATES OF AMERICA

vs.

JULIO ROSADO MUNIZ,
NEREIDA MARTINEZ-DAVILA and
ALLEN SANSON

INDICTMENT

VIOLATION; Title 21, United States Code,
Sections 846 and 841(a)(1)

A true bill.

Erwin Hoegner
Foreman

Filed in open court this 17th day
of September A.D. 1982

J. Stuart Cunningham
By Eugene Rolbo, Deputy Clerk

Bail, $ _____

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FILED
SEP 17 1982
'82 SEP 17 P 3:25
STUART CUNNINGHAM
CLERK, U. S. DISTRICT COURT

DOCKETED
SEP 20 1982

UNITED STATES OF AMERICA

v.

JULIO ROSADO MUNIZ,
NEREIDA MARTINEZ-DAVILA and
ALLEN SANSON

No. 82 CR 578

Violation: Title 21, United States Code; Sections 846 and 841(a)(1)

JUDGE LEIGHTON

The AUGUST 1982 GRAND JURY charges:

From on or about August 12, 1982, to on or about August 18, 1982, in the Northern District of Illinois, Eastern Division, and elsewhere,

JULIO ROSADO MUNIZ,
NEREIDA MARTINEZ-DAVILA and
ALLEN SANSON,

defendants herein, did combine, conspire, confederate and agree together, with each other, and with others unknown to the grand jury, to commit certain offenses against the United States, namely:

(a) to knowingly and intentionally possess with intent to distribute heroin, a Schedule I Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1);

(b) to knowingly and intentionally distribute heroin, a Schedule I Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1);

(c) to knowingly and intentionally possess with intent to distribute cocaine, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1); and,

(d) to knowingly and intentionally distribute cocaine, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

In furtherance of and to effect the objects of said conspiracy, defendants did and committed the following:

OVERT ACTS

1. On or about August 12, 1982, defendant JULIO ROSADO MUNIZ telephoned a confidential informant of the Drug Enforcement Administration in McAllen, Texas, to discuss the purchase of heroin.

2. On or about August 16, 1982, at 3123 Birchwood Avenue, in Chicago, defendant JULIO ROSADO MUNIZ met with said confidential informant. MUNIZ asked to purchase four kilograms of heroin.

3. On or about August 16, 1982, defendant JULIO ROSADO MUNIZ provided a sample of cocaine to said confidential informant.

4. On or about August 16, 1982, defendant JULIO ROSADO MUNIZ and NEREIDA MARTINEZ-DAVILA met with Special Agent Leo Arreguin of the Drug Enforcement Administration and said confidential informant and discussed the purchase of four kilograms of heroin.

5. On August 13, 1982, at Chicago, defendant JULIO ROSADO MUNIZ telephoned said confidential informant to discuss the purchase of four kilograms of heroin.

6. On August 18, 1982, defendants JULIO ROSADO MUNIZ and NEREIDA MARTINEZ-DAVILA met with Special Agent Arreguin and said confidential informant at 3123 Birchwood, in Chicago.

7. On August 18, 1982, defendants NEREIDA MARTINEZ-DAVILA and ALLEN SANSON met in the vicinity of Touhy and Kedzie Avenues, in Chicago.

All in violation of Title 21, United States Code, Section 846.

COUNT TWO

The AUGUST 1982 GRAND JURY further charges:

On or about August 17, 1982, at Chicago, in the Northern District of Illinois, Eastern Division,

JULIO ROSADO MINIZ,

defendant herein, did knowingly and intentionally distribute approximately 24 grams of a mixture containing cocaine, a Schedule II Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT THREE

The AUGUST 1982 GRAND JURY further charges:

On or about August 18, 1982, at Chicago, in the Northern District of Illinois, Eastern Division,

JULIO ROSADO MINIZ and
NEREIDA MARTINEZ-DAVILA,

defendants herein, did knowingly and intentionally possess with intent to distribute approximately 64 grams of a mixture containing cocaine, a Schedule II Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL:

FOREPERSON

United States Attorney

PED:tw

Allen Sanson

...TH CIRCUIT APPEAL INFORMATION SHEET ... THE NORTHERN DISTRICT

BOARD

DOCKET NO. 82 CR 578-3

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date — ALLEN SANSON — 02 11 83

COUNSEL
- [ ] WITHOUT COUNSEL — However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.
- [X] WITH COUNSEL — Richard Walsh

PLEA
GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE [X] NOT GUILTY

Plea:

There being a [ ] HUNG JURY [X] VERDICT of [ ] NOT GUILTY. Defendant is discharged: [ ] GUILTY.

FINDING & JUDGMENT

Defendant has been convicted as charged of the offense(s) of: knowingly, willfully and unlawfully possessing and distributing, a Schedule I Controlled Substance and a Schedule II Controlled Substance;

in violation of Title 21, United States Code, Section 846

BOOKETED FEB 22 1983

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS.

SENTENCE OR PROBATION ORDER

FURTHER ADJUDGED-that sentence is imposed under Title 18, Section 4205 (b)(2)

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends Lexington, Kentucky, where defendant may be treated for narcotic addiction.

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It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

s/s George N. Leighton — Feb. 11,1983

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Rec'd 1-20-84

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604
(ARGUED OCTOBER 21, 1983)

January 18, 19 84.

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53

Before

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 83-1324 vs.

ALLEN SANSON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 82 CR 678 George N. Leighton, Judge.

O R D E R

Defendant Allen Sanson asks this court to reverse his conviction for conspiring to possess with intent to distribute and conspiring to distribute heroin and cocaine in violation of 21 U.S.C. § 846 (1976). The defendant argues that admission at trial of his statements at the time of arrest regarding an earlier arrest was improper, that "expert" testimony from an agent regarding distribution of cocaine was improper, that statements of a co-conspirator should have been excluded from the trial as inadmissible hearsay, and that the government's failure to call the co-conspirator as a witness violated the defendant's sixth amendment confrontation right. Because we believe that the district judge properly exercised his discretion in each instance, we affirm the conviction.

I

Drug Enforcement Administration (DEA) agents in August 1982 investigated Julio Muniz and his wife, Hereida Martinez-Davila (Martinez). The investigation culminated on August 17, 1982, when Special Agent Arreguin met Muniz and Martinez through a confidential informant.

On August 17, Agent Arreguin and the informant went to Muniz's house for dinner. Agent Arreguin posed as a friend of the informant who could supply heroin to a willing buyer. Muniz agreed to buy $30,000 of heroin. The next morning Muniz called the informant to say that he had $15,000 toward the purchase of the heroin and more money on the way. When Agent Arreguin and the informant arrived at Muniz's house shortly thereafter, Muniz told them that a man who had worked a long time with him would bring money soon.

When the delivery man did not arrive, Muniz called someone who explained that the delivery man was late because he was attending his grandmother's funeral. Muniz placed several other telephone calls while he and the others waited for the delivery man to bring money. First, Muniz called the delivery man's wife who told them to expect a delivery soon. Next, he called another potential heroin purchaser. Third, he called the delivery man's wife back.

Several other maneuvers led to Martinez leaving the house to pick up the money from the delivery man. She drove to a local grocery store, went inside, exited a few minutes later, and then drove back to Muniz's house. Martinez presented Agent Arreguin with a bundle of money.

After Martinez returned to the house, the informant left the house on the pretense of picking up the heroin, but instead notified waiting surveillance agents, who approached the house. The agents and Agent Arreguin then arrested Muniz.

At the time of the arrest, Agent Arreguin answered a telephone call from a man wanting to know if everything was all right. The caller said that he had sent the money with Martinez. Meanwhile, the informant had driven to the same local grocery store as had Martinez, and there spotted Defendant Sanson using the telephone. After Sanson completed his call, the informant asked him if he knew Muniz. Sanson said yes, and in response to a question from the informant said that he had given Martinez money and was waiting for heroin.

Soon, Agent Arreguin arrived at the scene and discussed the heroin transaction with Sanson. DEA agents arrived shortly thereafter and arrested Sanson. At the moment of the arrest, which was conducted by an agent who had arrested Sanson before, Sanson said, "Oh, not again. I knew this was going to happen."

A jury found the defendant guilty after a two-day trial. The district court denied a motion for a new trial and sentenced the defendant to ten years imprisonment.

II

A. Admission of Statements Regarding Earlier Arrests

The defendant argues that his statements uttered shortly before and after his arrest should not have been admitted into evidence because they seriously prejudiced the jury against him. The government counters by arguing that the statements indicate the defendant's state of mind and his intent to conspire to possess and distribute heroin.

We note initially that rulings on the admissibility of evidence rest within the trial court's broad discretion and will be reversed only when the court clearly abuses that discretion. United States v. Brown, 688 F.2d 1112, 1115 (7th Cir. 1982). The defendant has not made this showing.

Federal Rule of Evidence 404(b) provides that evidence of other crimes is inadmissible to show character, but may be admissible for other purposes including motive, intent, preparation, or knowledge. The evidence at issue here was admissible to counter the defense theory that the defendant merely craved a "fix." The testimony meets a Rule 404(b) exception as evidence of the defendant's intent to join a conspiracy. The defendant's statements when he was arrested tended to show that he knew of a conspiracy and intended to be a part of that conspiracy.

Once the district court determined that the proffered testimony met a Rule 404(b) exception, it was within the court's discretion to admit the testimony into evidence after determining that its probative value outweighed any possible prejudice. We find no abuse of discretion.

B. Admission of Investigating Agent's Testimony

Agent Arreguin testified that the circumstances of the defendant's attempted drug purchase indicated an intent to distribute. The defendant contends that this testimony did not qualify as expert testimony under Federal Rule of Evidence 702, and thus should not have been admitted at trial. This contention must fail for two reasons. First, the defendant did not object at trial either to Agent Arreguin's qualifications to testify or to the testimony itself. Failure to object to the admissibility of evidence at trial ordinarily precludes an assignment of error on appeal. United States v. Jefferson, 714 F.2d 689, 693, 695 (7th Cir. 1983). Here, because the alleged error does not rise to constitutional magnitude, we will not consider the defendant's challenge in the absence of any objection at trial.

Second, the district court's decision to admit the testimony in any event was not clearly erroneous, and therefore must be affirmed. See, e.g., United States v. Thomas, 676 F.2d 531, 538 (11th Cir. 1982) (special agent allowed to testify as expert on the modus operandi of drug couriers). Agent Arreguin clearly possessed at least the minimum amount of expertise to qualify under Rule 702. Additionally, the testimony regarding the structure of the narcotics trade was relevant to placing the defendant in the sale and distribution chain. The district court committed no error in allowing the testimony.

C. Admission of Co-conspirator's Statements

The defendant next argues that the district court improperly applied United States v. Santiago, 582 F.2d 1128 (7th Cir. 1978), to admit statements by Muniz which implicated the defendant in the distribution scheme. The defendant concedes that the Muniz statements were made during and in furtherance of a conspiracy to distribute heroin. The defendant claims, however, that the government did not prove by a preponderance of independent evidence that the defendant and Muniz were co-conspirators. Once again, we believe the district court acted properly in admitting the testimony.

Once a conspiracy is established, only slight evidence is needed to link a particular participant to the conspiracy. United States v. West, 670 F.2d 675, 685 (7th Cir.), cert. denied, 102 S. Ct 2944 (1982). The circumstances and timing of the defendant's presence while the agents were investigating, and the defendant's own statements before arrest and when he was arrested, constitute sufficient evidence to link the defendant to a conspiracy with Muniz.* Accordingly, although the district court stated one item of evidence incorrectly when making its Santiago findings, the admission of the Muniz statements does not constitute reversible error.

The defendant presses another argument with regard to the Muniz statements: that they are inherently untrustworthy and

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*The defendant also argues that the district court improperly used the statements of the co-conspirator as evidence of the defendant's link to the conspiracy so that the co-conspirator's testimony could be presented to the jury. This type of bootstrapping was recognized as improper in United States v. Coe, 718 F.2d 830, 836 (7th Cir. 1983). We reach no judgment on whether such an error was committed here in light of our determination that sufficient independent evidence links the defendant to the conspiracy. That independent evidence renders any error harmless.

therefore inadmissible. This contention is without merit. The evidence linked Muniz and the defendant as co-conspirators, and Muniz's statements in furtherance of that conspiracy were made within the community of interests that suggests the inherent reliability which forms the basis of Federal Rule of Evidence 801(d)(2)(E).

D. Sixth Amendment Confrontation Right

The defendant's final argument is that admission of the Muniz statements when Muniz himself was available to testify violated the defendant's sixth amendment right to be confronted with the witnesses against him. Before hearsay evidence is admissible, the prosecution must satisfy the requirements of the Confrontation Clause by demonstrating that the declarant is unavailable and that the proposed testimony is reliable. Ohio v. Roberts, 448 U.S. 56 (1980). As noted above, the Muniz statements are reliable as within the community of interests of the conspirators under Rule 801(d)(2)(E). The only issue, therefore, is whether the government adequately showed that Muniz was unavailable to testify.

First, this court has held consistently that statements admitted under Rule 801(d)(2)(E) do not infringe upon Confrontation Clause protections. See, e.g., United States v. Kendall, 665 F.2d 126, 133 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982). Statements that qualify under Rule 801(d)(2)(E) are not hearsay and are inherently reliable; they generally do not threaten the Confrontation Clause protections considered in Ohio v. Roberts. Second, the district court ruled that Muniz was unavailable on the strength of representations from the government that Muniz refused to talk and representations from the defendant's lawyer that Muniz was counseled by his lawyer to invoke his fifth amendment privilege and refuse to testify. Under the particular circumstances of this case, including the character of the Muniz statements admitted and the representations from lawyers for both sides that Muniz was unavailable to testify, the district court properly admitted the Muniz statements into evidence.

E. Conclusion

The district court ruled correctly in each of the instances raised on appeal by the defendant. Accordingly, we affirm the conviction.

AFFIRMED.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

83-6454

No. _____

ORIGINAL

ALLEN SANSON, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

MOTION TO PROCEED IN FORMA PAUPERIS

Petitioner Sanson moves this Court for an order pursuant to 18 U.S.C. §3006 A(d)(6) and Rule 46 of this Court, permitting him to proceed in forma pauperis. In support of his motion, movant states the following:

1. Petitioner was represented in the Court of Appeals by court-appointed counsel pursuant to the Criminal Justice Act, 18 U.S.C. §3006 A. Counsel was appointed on March 7, 1983.

2. Petitioner moved the District Court for permission to proceed in forma pauperis on February 11, 1983. The motion was granted on the same day.

3. Pursuant to 18 U.S.C. 3006A(d)(6) and Sup. Ct. Rule 46 no affidavit accompanies this motion.

Respectfully submitted,

Clifford L. Weaver
Attorney for Petitioner-Movant

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